

1 holding cells (Count II).

2 The Court construed Plaintiff's claims as brought pursuant to the Eighth and
3 Fourteenth Amendments and directed Defendant to answer or otherwise respond. (Doc. 7.)

4 Defendant filed a Motion to Dismiss. (Doc. 11.)

5 **II. Motion to Dismiss**

6 **A. Legal Standards**

7 **1. Exhaustion of Administrative Remedies**

8 Under the Prison Litigation Reform Act (PLRA), a prisoner may not bring a lawsuit
9 with respect to prison conditions under § 1983 unless all available administrative remedies
10 are exhausted. See 42 U.S.C. § 1997e(a); Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th
11 Cir. 2006); Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). He must complete the
12 administrative review process in accordance with the applicable rules. See Woodford v.
13 Ngo, 126 S. Ct. 2378, 2384 (2006). Exhaustion is required for all suits about prison life,
14 Porter v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered through
15 the administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001).

16 Exhaustion is an affirmative defense. Jones v. Bock, 127 S. Ct. 910, 919-21 (2007).
17 Defendant bears the burden of raising and proving the absence of exhaustion. Wyatt v.
18 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Because exhaustion is a matter of abatement
19 in an unenumerated Rule 12(b) motion, a court may look beyond the pleadings to decide
20 disputed issues of fact. Id. at 1119-20. Further, a court has broad discretion as to the method
21 to be used in resolving the factual dispute. Ritza v. Int'l Longshoremen's &
22 Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988) (quotation omitted).

23 **2. Reconsideration**

24 Motions for reconsideration should be granted only in rare circumstances. Defenders
25 of Wildlife v. Browner, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Mere disagreement with
26 a previous order is an insufficient basis for reconsideration. See Leong v. Hilton Hotels
27 Corp., 689 F. Supp. 1572, 1573 (D. Haw. 1988). Rather, reconsideration is appropriate only
28 "in the face of the existence of new evidence, an intervening change in the law, or as

1 necessary to prevent manifest injustice.” Navajo Nation v. Confederated Tribes of Yakama
2 Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003).

3 **B. Parties’ Contentions**

4 **1. Defendant**

5 Defendant contends that, as to Count II, Plaintiff failed to exhaust his administrative
6 remedies as required by the PLRA, 42 U.S.C. § 1997e(a). (Doc. 11 at 2-6.) In support,
7 Defendant submits the declaration of Sergeant Selethia Down, who is assigned to the Inmate
8 Hearing Unit. (Id., Ex. 1, Down Decl. ¶ 1.) Down attests that her duties include receipt,
9 processing, tracking, and storage of inmate grievances. (Id. ¶ 2.) The grievance procedure
10 at the jail is a multi-tiered system that includes: (1) the initial grievance to the line officer and
11 response; (2) review of the grievance by the shift supervisor and response; (3) review of the
12 grievance and decision by the Bureau Hearing Officer; (4) the Institutional appeal to the Jail
13 Commander; and (5) the External appeal. (Id. ¶ 4; Ex. B.)

14 She further attests that according to the Sheriff’s Office records, Plaintiff filed six
15 grievances, two of which concerned overcrowding. (Id. ¶ 7.) One of those grievances—No.
16 09-12955—related to the jail intake cells and the other—No. 09-15788—concerned the
17 holding cells at Mesa Superior Court. (Id.) Mesa Superior Court is not a part of the MCSO
18 Jail system, and MCSO is not responsible for the conditions in the holding cells used by the
19 court. (Id. ¶ 8.) As to grievance No. 09-12955, Down attests the Plaintiff did not appeal his
20 request for relief to the highest level; in fact, it was not appealed beyond the level of Bureau
21 Hearing Officer. (Id. ¶ 10.) Also attached to the motion is a copy of the Inmate Grievance
22 Procedure, Policy DJ-3; Rules and Regulations for Inmates; a sample Inmate Grievance
23 Form; grievances and an Index of Grievances filed by Plaintiff; and a copy of the Complaint.
24 (Id., Exs. A-E.)

25 Defendant also argues that Plaintiff fails to state a claim in Count I or Count II. (Doc.
26 11 at 8.) Defendant asserts that in Count I, Plaintiff essentially alleges that jail detainees
27 receive two meals a day and that those meals are not pleasing to Plaintiff. Defendant argues
28 that these allegations do not state a constitutional violation. He notes that Plaintiff also

1 alleges that Arpaio “does this to punish the detainees” but that this allegation is a mere
2 conclusion without supporting allegations that show an intent to punish or that the handling
3 of food service in the jails is not simply a means to operate the jails in a manageable way.
4 (Id.) Defendant asserts that Plaintiff has not alleged that Defendant personally participated
5 in the deprivation of Plaintiff’s constitutional rights and has not properly alleged any facts
6 showing that his constitutional rights were violated as a result of Defendant’s implementation
7 of an official policy. (Id. at 9.)

8 **2. Plaintiff**

9 Plaintiff submits his response (Doc. 14), including 14 pages of grievances and
10 responses to them. He asserts that he is sending the Court copies of each grievance that he
11 filed relating to anything “that may be crossing the line into violating [his] civil rights.” (Id.
12 at 1.) He further asserts that meals consisted of unknown items, that Defendant attempted
13 to charge inmates for food, and then inmates began receiving “slop.” (Id. at 2.) Plaintiff also
14 states that the intake cells were the dirtiest places he had ever seen. He concludes by saying
15 that he did what he knew to exhaust administrative remedies. (Id. at 3.)

16 In his Complaint, Plaintiff alleged that he exhausted the claims in Count I regarding
17 the meals and was did not appeal to the highest level as to Count II because the appeal was
18 “still in process.” (Doc. 1 at 3, 4.)

19 **3. Reply**

20 In his reply, Defendant asserts that Plaintiff fails to provide any evidence to rebut
21 Defendant’s evidence that Plaintiff did not exhaust administrative remedies. (Doc. 15 at 2.)
22 Defendant contends that Plaintiff merely provides copies of irrelevant grievances, confirming
23 that Plaintiff did not pursue or exhaust the grievance process, and that the response does not
24 address Defendant’s arguments that Plaintiff failed to allege a constitutional violation.
25 Plaintiff merely reiterates the conclusory allegations made in his Complaint. (Id.)

26 **C. Analysis**

27 Defendant has met his burden to show that Plaintiff failed to exhaust administrative
28 remedies regarding his claims in Count II—overcrowding in the intake and holding cells.

1 Defendant provides uncontested evidence of an available grievance procedure and that
2 Plaintiff failed to complete the procedure as to this claim, and Plaintiff does not offer
3 evidence to refute.

4 Plaintiff's response to the motion includes several grievances and responses but
5 Plaintiff points to nothing showing that he appealed his grievance about the intake cells
6 beyond the level of the Bureau Hearing Officer. "Judges need not paw over the files without
7 assistance from the parties." Orr v. Bank of America, 285 F.3d 764, 775 (9th Cir. 2002)
8 (quoting Huey v. UPS, Inc., 165 F.3d 1084, 1085 (7th Cir. 1999)). And Plaintiff asserted in
9 his Complaint that he was still in the process of exhausting remedies on this claim. The
10 PLRA mandates that an inmate exhaust remedies *before* filing a lawsuit; exhausting remedies
11 during the course of the lawsuit does not comply with the requirement. McKinney v. Carey,
12 311 F.3d 1198, 1120-21 (9th Cir. 2002).

13 Nevertheless, the Court has examined the documents provided by Plaintiff, and,
14 although he includes a grievance dated September 20, 2009, that complains about conditions
15 in the intake cells, there is no Institutional grievance appeal or External appeal. Therefore,
16 Plaintiff has failed to refute Defendant's evidence that Plaintiff did not exhaust his
17 administrative remedies as to the claims in Count II. These claims will be dismissed without
18 prejudice. The court need not consider Defendant's argument that Count II fails to state a
19 claim.

20 The Court will deny the request to dismiss Count I. Defendant argues that Count I
21 fails to state a claim, but the Court has already screened the Complaint pursuant to 28 U.S.C.
22 § 1915A(a), which uses the same standard as Rule 12(b)(6), Resnick v. Hayes, 213 F.3d 443,
23 447 (9th Cir. 2000), and found that Count I states a claim against Defendant. As the United
24 States Court of Appeals for the Ninth Circuit has instructed, courts must "continue to
25 construe *pro se* filings liberally." Hebbe v. Pliler, 611 F. 3d 1201, 1205 (9th Cir. 2010). A
26 "complaint [filed by a *pro se* prisoner] 'must be held to less stringent standards than formal
27 pleadings drafted by lawyers.'" Id. (quoting Erickson v. Pardus, 551 U.S. 89, 94 (2007) (*per*
28 *curiam*)); Haines v. Kerner, 404 U.S. 519 (1972).

1 A Motion to Dismiss for Failure to State a Claim is almost never appropriate after the
2 complaint has been screened under 28 U.S.C. § 1915A(a) and is essentially a motion for
3 reconsideration, which should be granted only in rare circumstances. See Defenders of
4 Wildlife, 909 F. Supp. at 1351. Defendant has presented insufficient grounds for this Court
5 to reconsider its ruling that Count I states a claim. The Court notes that Plaintiff alleged that
6 the issues with the food were pursuant to policy set by Defendant. That is sufficient to allege
7 personal involvement. See Ortez v. Washington County, Or., 88 F.3d 804, 809 (9th Cir.
8 1996). And, as stated, *pro se* pleadings are liberally construed. Hebbe, 611 F. 3d at 1205.

9 **IT IS ORDERED:**

10 (1) Defendant's Motion to Dismiss (Doc. 11) is **granted in part and denied in**
11 **part** as follows:

12 (a) **granted** to the extent that Count II is dismissed without prejudice for
13 failure to exhaust administrative remedies; and

14 (b) **denied** in all other respects.

15 (2) The remaining claim is Count I.

16 DATED this 2nd day of November, 2010.

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19 G. Murray Snow
20 United States District Judge
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